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IN THE

Supreme Court of the United States

October Term, 1965
No. 1028

No. 19814
LOUIS LESSER and JEANNE LESSER, *Petitioner,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

No. 19815
WILLIAM MALAT and ETHEL MALAT, *Petitioner,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

No. 19816
CRAIG ADOLPHE LESSER TRUST #2, *et al.*, *Petitioners,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

No. 19817
CATHY J. LESSER TRUST #2, *et al.*, *Petitioners,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

No. 19818
THERESE ANN LESSER FORD TRUST #2, *Petitioner,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

No. 19819
FRANCINE S. LESSER TRUST #2, *et al.*, *Petitioner,*
vs.
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals, Ninth Circuit.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals, Ninth Circuit.

Petitioners hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The findings of fact and opinion of the Tax Court are reported at 42 T.C. 688. The opinion of the Court of Appeals (Appendix herein) is reported at 352 F. 2d 789. This petition is limited to the issue of depreciation.

Jurisdiction.

The judgment of the Court of Appeals was entered November 9, 1965. A petition for rehearing, and for rehearing *en banc*, limited to the issue of depreciation, was denied December 6, 1965. The jurisdiction of this Court is based on 28 U.S.C. §1254(1).

Questions Presented.

1. Where the Tax Court determines, for purposes of depreciation, a single useful life of a "building as a whole" saying that it is "giving proper consideration to the condition of any of the components that may affect the composite life of the entire structure" [R. 37], but without stating the formula on which the said composite life is based, or any figures from which it can be derived, or even the components which it included, should not the cause be remanded and the Tax Court required to disclose its formula, or state how it arrived at its determination?

2. Where petitioners purchased the property only because of a lease which the lessee executed as one of the documents in the purchase escrow, and the lessee could, under said lease, and immediately upon taking possession thereunder did, completely remodel the building, was the useful life to be determined, as the Tax Court did, on the basis of the character of the original building, or on the basis of the character of the building as so remodeled?

Statutes Involved.

Internal Revenue Code of 1954.

Sec. 167. Depreciation.

(a) General Rule.—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

. . . .

Statement.

General.

This petition involves the income taxes of petitioners for 1959. The deficiencies determined by the Tax Court, and affirmed by the Court of Appeals, are based on adjustments in the income of two partnerships, Louis Lesser Enterprises, Ltd., hereinafter referrred to as "Enterprises," and Lesser Industrial Properties, Ltd., hereinafter referred to as "Industrial." This petition is limited to the issue of the useful life for depreciation purposes of certain industrial property.

Acquisition of the Property Involved.

On June 10, 1958, Industrial was advised by the treasurer of Beckman Instrument Corporation that that corporation was interested in selling its "Helipot" building, located at Newport Beach, California. This building had been constructed by the Beckman Instrument Corporation in July of 1957, and had since then been occupied and used by the Helipot Corporation, a "division" of Beckman Instrument Corporation [R. 16-17].

Industrial communicated with Hughes Aircraft Company, hereinafter referred to as "Hughes," to ascertain whether that corporation would be interested in leasing the Helipot building. Upon being informed that Hughes was interested in such a lease, Industrial, on June 11, 1958, secured from Beckman Instrument Corporation an option to purchase the property [R. 17].

On June 12, 1958, Industrial received from Hughes a written offer to lease the property. The offer was accepted by Industrial. Neither Enterprises, Industrial, nor any of their members nor their corporate successor, at any time had an interest in Hughes [R. 17].

On June 13, 1958, Enterprises and the Helipot Corporation entered into an agreement wherein the former agreed to purchase and the latter to sell the Helipot building. The agreement provided that the closing date of the transaction would be September 30, 1958, and that possession would be delivered on the closing date. In accordance with the terms of the agreement, the purchase from Helipot Corporation was completed, and Industrial acquired the property on September 30, 1958, at a total cost of $2,753,909.44. The purchase was made nominally by Enterprises, and the property then in turn conveyed by Enterprises to Industrial [R. 17-18].

The Helipot building would not have been purchased by Industrial without first having a lease commitment [R. 18].

Provisions of the Lease.

The basic term of the lease was 20 years [R. 19]. The rental was $25,000 per month [R. 19-20]. Beyond the basic term there were given lessee six successive 5-year renewal options at progressively reduced rentals,

but there was no renewal option given to lessor [R. 21-22].[1]

The lease provided that the lessee could erect and install such improvements in or upon the building leased thereunder, and to make such alterations to the interior thereof, as it might desire, at its own expense; and that at any time during the term of the lease, the lessee also could, at its option, remove all improvements, machinery, fixtures and equipment installed by it, except elevators, if any [R. 20-21]. On termination of the lease the lessee was obligated to surrender the building to the lessor "in good condition and repair, subject only to the effect of reasonable wear [and] tear during the term of [the] lease." [R. 20-21].

Other Findings.

The total cost of the Newport Beach property to Industrial, $2,753,909.44, was allocated by it between land and building on the basis of the property tax assessments, $88,675.88 being allocated to the land and $2,665,233.56 to the building. The total original cost of construction of the building to Industrial's vendor, about a year earlier, was $2,567,112.00 [R. 22].

The building as originally designed and constructed was usable for a variety of light manufacturing purposes and was not a one-purpose building [R. 18]. Hughes, however, upon taking possession of the building, *immediately* engaged in a five million dollar program of completely remodeling and expanding the structure, for the sole purpose of converting it into a plant for the manufacture of semi-conductors, diodes and

[1]It is mathematically obvious that the rentals during the basic term were sufficient to return to Industrial its total cost and pay it a substantial return on its investment.

transistors. Virtually all of the interior of the building was torn out; the building was extensively remodeled, and horizontal additions to the building resulted in almost doubling its original size [R. 22].

Industrial on its returns had taken depreciation of the Helipot building on the basis of a 25-year life [R. 32]. Respondent in his deficiency notices allowed depreciation of the building on the basis of a 50-year life [R. 32]. The Tax Court found that the building "when acquired by Industrial" [R. 37] had a depreciable life of 45 years "from the date of" such acquisition. [R. 22, 37]. It made no finding at all as to the life of the building as remodeled by Hughes.

Proceedings in the Courts Below.

In the trial herein petitioners called as their witness on this issue of useful life a licensed general contractor who was general manager of a firm of architects, engineers and general contractors, practicing primarily in the commercial industrial field. [R. 65-66]. He had been in that field for 25 years. [R. 65]. During the remodeling of the Helipot building he was the full-time project manager on that particular job. All the work was done under his supervision. [R. 66, 74]. In the course of his testimony he answered numerous questions of the court. [R. 65-75]. No challenge was made during the trial to his qualifications; and respondent offered no rebuttal evidence.

Just how the Tax Court arrived at its finding of a 45-year composite life is not shown in either the Tax Court's findings or its opinion. It stated only that the problem was "not susceptible of any precise mathematical solution," and that it was "one of judgment upon

the basis of the entire record, taking into account the probable useful life of the building as a whole, and giving proper consideration to the condition of any of the components that may affect the composite life of the entire structure." [R. 37]. Also, while, as indicated above, it made a finding that the building as originally designed and constructed was usable for a variety of light manufacturing purposes and was not a one-purpose building, it made no corresponding finding as to the character of the building as remodeled by the lessee.

There was, however, testimony of the said witness showing the character of the structure as remodeled, which the Tax Court did not question. The production of semi-conductors, diodes and transistors, for the sole purpose of which the lessee, as the Tax Court found [R. 22], remodeled the structure, was, he testified, "a very, very specialized type of production." [R. 71]. Indeed, as the witness stated in response to a question by the court, the structure, as remodeled by the lessee, was "more like a machine than . . . a building, very technical." [R. 67]. Also, as he testified, the method of manufacture involved is a rapidly changing one, resulting in a continuing reconstruction program. [R. 71-72]. And, as the witness further stated, on cross-examination by respondent, if the lessee removed its installations, as the Tax Court found it could at any time during the lease [R. 20-21], the building "would be an unusable building." [R. 75].

The Tax Court, nevertheless, failed to make any finding as to the character of the structure as remodeled, or, as observed above, as to the useful life of the structure as remodeled. It based its finding of useful life solely and expressly on the original structure, the

"Helipot building when acquired by Industrial" [R. 37], and consisting either of that "building as a whole," including all of the original components in their condition at the time of purchase [R. 35, 37], or consisting only of the original structure minus the components torn out in the remodeling by the lessee [R. 36]. *There is not even any way of knowing which.*

In the appeal to the Court of Appeals this issue of useful life was raised expressly on the basis of the building as remodeled by the lessee [R. 47-48, 50-51, 53, 55-56, 58, 60-61]. The Court of Appeals, nevertheless, concluding that the Tax Court's action "in determining lives and proportions by its own formula" was not clearly erroneous, affirmed, "for the reasons stated in the opinion of the Tax Court." (Appendix).

Reasons for Granting the Writ.

1. The decision below is in clear conflict with the decision of the United States Court of Appeals for the First Circuit in *Worcester County Trust Co. v. Commissioner,* 134 F. 2d 578. The court there, citing and quoting from this court's decision in *Helvering v. Taylor,* 293 U.S. 507, 55 S. Ct. 287, remanded the cause to the Board of Tax Appeals, now the Tax Court, because the determination of the Board was "without rational foundation and excessive."

Here the Tax Court's determination was clearly, indeed expressly, based on the original building, a building which did not exist during the taxable year involved. The building in existence was the building as remodeled under the terms of the lease. The evidence, page 7, *supra,* clearly shows that that building, unlike the original building, was a unique, one-purpose building. That this

is a factor which must be considered the Tax Court has itself shown. *Paul W. Frenzel v. Commissioner,* 22 T.C.M. 1391, 1402.

We are sure respondent will not question the irrationality of basing depreciation on a building not even in existence during the year involved. We submit that this is a clear conflict with the decision cited of the United States Court of Appeals for the First Circuit.

2. The decision below is in clear conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *James Petroleum Corporation v. Commissioner,* 331 F. 2d 344. The Court there, citing this court's decision in *Commissioner v. Duberstein,* 363 U.S. 278, 80 S. Ct. 1190, remanded the cause to the Tax Court because, page 345:

> "There is only the finding of the ultimate fact or conclusion with no other findings to show how such conclusion was reached. . . . There being no supporting findings, we are unable to determine the basis for the decision as we cannot make nor assume findings."

On the same point it is stated in *Federal Practice and Procedure,* Barron and Holtzoff, Vol. 2B, Chap. 10, §1127, at p. 503:

> "From these expressions of the highest court it is fair to conclude that the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion of each factual issue."

Here, under the Treasury Regulations, §1.167(b)-(0)(a), no change could be made from the figure for

useful life used in computing the deduction for depreciation taken by petitioners on their returns unless there was a "clear and convincing basis for a change." The petitioners had used a 25-year life on their returns. The Commissioner determined a 50-year life. The Tax Court did not sustain the Commissioner but determined a 45-year life instead. Nowhere is there any showing of the basis for the change from the figure used by petitioners on their returns.

The only thing clear from the Tax Court's findings and opinion here is that it drew its ultimate finding of useful life from the original building, not the building as remodeled under the terms of the lease. It is impossible to know whether the whole of the original building was used, or the part of it remaining after the remodeling, or just how its useful life was determined.

The conclusion of the Court of Appeals is even more difficult to understand. As observed above, p. 8, the Court of Appeals concluded that the Tax Court's action "in determining lives and proportions by its own formula" was not clearly erroneous. It does not say, nor could it say, what that formula was, because no formula of any kind was spelled out by the Tax Court. Indeed, the Court of Appeals wholly misrepresents both the contentions of petitioners and the opinion of the Tax Court.

We submit for these reasons that there is a clear conflict with the decision of the Tenth Circuit in *James Petroleum Corp. v. Commissioner, supra.*

3. We suggest also that the decision below is in probable conflict with the decisions of this court cited

in 1 and 2 above, and for the reasons quoted above from the opinions of courts of appeals citing respectively the said decisions of this court.

4. The decision below, because of the failure of the Tax Court to make a finding as to the useful life of the building as remodeled, is in clear conflict with the decision of the same circuit in *Anaheim Union Water Company v. Commissioner,* 321 F. 2d 253, 260, the decision of the Fifth Circuit in *J. H. Robinson Truck Lines, Inc. v. Commissioner,* 183 F. 2d 739, 740, and the decision of the Sixth Circuit in *Loesch & Green Construction Company v. Commissioner,* 211 F. 2d 210, 212. Each of these cases holds that testimony which is unrebutted and unchallenged cannot be ignored.

Expert testimony here shows, as detailed above, page 7, (a) that the building as remodeled was a one-purpose building, (b) that the method of manufacture carried on in the building was a rapidly changing one, resulting in a continuing reconstruction program, and (c) that if the lessee removed its installations, which it could under its lease, the building would be an unusable building. This testimony was wholly unrebutted and unchallenged by respondent; and it has not been questioned by either court below.

Since the Tax Court failed to make a finding based on the above testimony, the decision of affirmance by the Court of Appeals is in conflict with the said decisions of the same, the Fifth and the Sixth circuits.

5. The decision below is also in conflict with *Spinks Realty Co. v. Commissioner,* App.D.C., 62 F. 2d 860.

The Tax Court here held that the "portion of the purchase price otherwise allocable to the demolished part [of the original building] must be treated as allocated

to the remaining property." [R. 36.] It referred in that connection to *Blumenfeld Enterprises,* 23 T.C. 665, 670, affirmed, 232 F. 2d 396 (C.A. 9). But it overlooked the fact of the lease; for in the *Blumenfeld* case itself the Tax Court, at page 671, relying *inter alia* on *Spinks Realty Co., supra,* stated that "the removal of a building in connection with obtaining a lease on the property is regarded as part of the cost of obtaining the lease."

This principle is, indeed, clearly shown in the *Spinks* case, pages 861-862, where, as here, property was demolished by a lessee pursuant to provision made in the lease. The property here being, as constructed by the lessee, a unique, one-purpose property, its life should therefore have been determined by the lease. Petitioners raised this issue in the Tax Court, but it was brushed aside by that court on the basis of the wholly unrelated character of the original building [R. 33]. Petitioners raised the same issue in the Court of Appeals [R. 48, 50-51, 53, 56, 58, 61], but there is nothing in that court's opinion to indicate that it gave it any consideration.

We submit, therefore, that the decision below is in conflict with the holding of the United States Court of Appeals for the District of Columbia Circuit in *Spinks Realty Co. v. Commissioner, supra.*

Wherefore, petitioners pray that this Court issue the writ of certiorari sought herein to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.

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APPENDIX.

Opinion of Court of Appeals on Issue of Depreciation.

United States Court of Appeals for the Ninth Circuit.

Louis Lesser and Jeanne Lesser, Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 19,814.

William Malat and Ethel Malet, Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 19,815.

Craig Adolphe Lesser Trust #2, et al., Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 19,816.

Cathy J. Lesser Trust #2, et al., Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 19,817.

Therese Ann Lesser Ford Trust #2, Petitioner, vs. Commissioner of Internal Revenue, Respondent, No. 19,818.

Francine S. Lesser Trust #2, et al., Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 19,819.

[November 9, 1965]

Petition to Review a Decision of the Tax Court of the United States.

Before: Barnes, Hamley and Jertberg, Circuit Judges

Barnes, Circuit Judge:

Petitioners appeal from a decision of the Tax Court, raising two issues: (1) the year of deductibility of a certain bad debt loss; and (2) the amount of a depreciation deduction allowable.

* * * * *

The Tax Court found a forty-five year depreciable life on the Helipot Building, and refused to accept as valid a composite rate for the life of the building based on the useful lives of its various components, as proposed by petitioners. The Tax Court found: "The matter . . . is not susceptible of any precise mathematial solution." We agree. The only way that the composite method urged by taxpayers could have benefited them would be if the Tax Court accepted not only taxpayers' theory, but their figures as to the expected lives of the various components *and* the fractions of the total value of the building attributable to each. We cannot agree the action of the Tax Court in determining lives and proportions by its own formula was clearly erroneous.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1028

LOUIS LESSER, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In July, 1958, Lesser Industrial Properties Ltd. (Industrial), a partnership consisting of the taxpayers involved in this action, purchased a building located in Newport Beach, California, for a total price of approximately $2,700,000, and immediately leased it to Hughes Aircraft Company for 20 years, with options on Hughes' part to renew for an additional 30 years. The building was about one year old at the time. Its basic structure or shell, which was masonry and steel, with concrete floors, was "of a longlife nature, very permanent masonry type" with a useful life of up to sixty years (R. 18, 70). Other components of the building, such as painting, electrical work, plumbing, and air conditioning, had shorter

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useful lives and would require renewing or replacing prior to the end of the life of the building as a whole. Immediately after taking possession Hughes expended $5,000,000 in remodeling and expanding the building and converting it into a plant for the manufacture of semi-conductors, diodes and transistors (R. 22).

In computing depreciation on the building, Industrial used an estimated useful life of 25 years. Petitioners, as partners in Industrial, claimed *pro rata* shares of the depreciation deduction on their individual tax returns. The Commissioner disallowed part of the depreciation deductions on the ground that the building had an estimated useful life of 50 years. (R. 16–22, 32–37.) The Tax Court found that the useful life of the building was 45 years (R. 22, 37), and the court of appeals affirmed (Pet. App. 2).

The decision below is correct, there is no conflict of decisions, and the issue presented is not one of general importance.

1. This case involves the essentially factual determination of the useful life of a building for the purpose of computing the amount of depreciation allowable under § 167 of the Internal Revenue Code of 1954. The Tax Court, on the basis of the exhibits and testimony, found that the building in question had a useful life of 45 years, thereby rejecting both the petitioners' contention of a 25 year life and the Commissioner's determination of a 50 year life. The court of appeals, concluding that the Tax Court's findings were not clearly erroneous, affirmed. There is no compelling reason for this Court to review the

concurrent factual findings of the two lower courts. *Corn Products Co.* v. *Commissioner,* 350 U.S. 46, 51; *Comstock* v. *Group of Investors,* 335 U.S. 211, 214.

2. Moreover, the Tax Court's finding was clearly supported by the evidence. There is no dispute that in determining the useful life of a composite asset, such as a building, consideration should be given to the lives of its various component parts, with each part's relative weight based, in general, upon the taxpayer's cost basis for that component. Petitioners' own witness stated that the shell of the building here in question was of very durable construction and had a life of 40 to 60 years (R. 34, 70–71); the court found "that it was much closer to 60 years" (R. 34). The Tax Court also concluded that when the petitioners' witness testified that other components, such as electrical work, plumbing, ceilings, etc., had a life of 10 to 15 years, "he was shading it in petitioners' favor" (R. 34). Finally, the court concluded that, in reaching a composite estimated useful life for the building as a whole, the life of the shell was entitled to more weight than the life of the interior components, since petitioners expected much of the buildings' interior to be torn out as a part of the remodeling. It is well established that where a taxpayer purchases property with the intention of demolishing part of it, the consideration is allocated to the remainder of the property. See R. 36 and cases cited there. Therefore, the principal portion of the approximately $2,700,000 petitioners paid for the building would be allocated to the shell, and the Tax

Court was correct in giving the life of the shell more weight than the life of the interior.

3. Petitioners argue that although the original building as purchased by petitioners might have had a life of 45 years, the building as remodeled by the lessee had a substantially shorter useful life, *i.e.*, that the remodeling transformed the building into a "unique, single-purpose" structure which would become essentially unsalable and unusable at the end of "the basic 20-year term of the lease" (R. 33). Although petitioners contend that the Tax Court "failed to make any finding as to the character of the structure as remodeled" (Pet. 7), the Tax Court's opinion clearly shows that it rejected petitioners' contention that the remodeling made the building unsuitable for use before the end of its estimated 45 year physical life. After stating petitioner's argument on this point the Tax Court found as follows (R. 33):

> We are satisfied by the evidence that the property was not a unique, single-purpose building, and that the termination of the basic 20-year term of the Hughes lease would not put an end to its useful life, wholly apart from the six renewal options of five years each which contemplated further occupancy of up to 30 additional years by Hughes beyond the 20-year basic term. * * *

4. Petitioners' contentions that the instant decision conflicts with decisions of other courts of appeals are without merit. In *James Petroleum Corp.* v. *Commissioner,* 331 F. 2d 344 (C.A. 10), where the Tax Court had merely stated its ultimate conclusion with-

out making adequate supporting findings of fact, the court of appeals remanded for further findings. In the instant case, however, the Tax Court made ample findings. There is no basis for petitioners' contention that the Tax Court, when making a factual finding concerning the life of a depreciable asset made up of various components, must state the formula used in reaching its conclusion, showing a detailed break-down of the components and the estimated useful life of each. In an analogous fact finding situation, the determination of the value of property, the trial court is not required to state the formula used in reaching a conclusion based on all the evidence in the case.[1]

Nor is the decision below in conflict with *Anaheim Union Water Co.* v. *Commissioner,* 321 F. 2d 253 (C.A. 9); *J. H. Robinson Truck Lines* v. *Commissioner,* 183 F. 2d 739 (C.A. 5), or *Loesch & Green Const. Co.* v. *Commissioner,* 211 F. 2d 210 (C.A. 6), which held that "testimony which is unrebutted and unchallenged cannot be ignored" (Pet. 11). In the instant case, unlike the three cases cited, the Tax Court found that taxpayers' witness was "shading [his testimony] in petitioners' favor" (R. 34). This Court has held that the Tax Court may decline to accept expert testimony at face value. *Helvering* v. *Nat. Grocery Co.,* 304 U.S. 282, 295.

[1] In *Worcester County Trust Co.* v. *Commissioner,* 134 F. 2d 578, 581 (C.A. 1), the court of appeals merely held that the Board of Tax Appeals' determination was "without rational foundation." The Tax Court's decision in the instant case is, however, as the court of appeals found, supported by the record.

Finally, the decision below does not conflict with *Spinks Realty Co.* v. *Burnet,* 62 F. 2d 860 (C.A.D.C.). In that case the lessee, pursuant to a new lease, demolished a building which it had been renting and constructed a new one. The court held that the lessor must amortize his basis in the building over the period of the lease. That holding is in no way relevant to the instant case, where petitioners purchased and leased their building, not on the condition that it be demolished, but with the understanding that it be improved. The Tax Court found that the life of the building before and after remodeling was 45 years, and its decision is supported by the record.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioners' Reply to Memorandum of Respondent in Opposition.

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Petitioners' Reply to Memorandum of Respondent in Opposition.

I.

Respondent Grossly Misrepresents the Findings.

1. The Tax Court found [R. p. 18]:

> "The Helipot building *as originally designed and constructed* was usable for a variety of light manufacturing purposes and was not a one-purpose building." (Italics supplied.)

Nowhere is there a corresponding finding as to the building as reconstructed by the lessee under the terms of the lease.

The sentence which respondent quotes, which says that "the property was not a unique, single-purpose building" (Br. p. 4), is taken from the Tax Court's subsequent opinion. [R. p. 33.] It clearly relates to the finding above quoted. It cannot, by any conceivable in-

terpretation, relate to any other part of the findings. Nor can it by any possibility have been intended as a separate and additional finding relating to the building as reconstructed. If the Tax Court had meant this it could very easily have said so.

2. Respondent's own discussion shows that he, too, is speaking only of the building as originally designed and constructed. He says (Br. p. 5) that there is no basis "for petitioners' contention that the Tax Court . . . must state the formula used in reaching its conclusion, showing a detailed break-down of the components and the estimated useful life of each." Petitioners made no such contention; but more important, there was no evidence of that character relating to the building as reconstructed. Respondent's discussion on this is but a further attempt by him to color the building as reconstructed with the character of the building as originally designed and constructed.

3. Respondent cites *Helvering v. National Grocery Co.*, 304 U.S. 282, 295, for the proposition that the Tax Court "may decline to accept expert testimony at face value." In the cited case, as this Court's opinion there shows in detail, pages 291-295, there was considerable evidence contradicting the expert testimony introduced. Here the expert testimony was absolutely unrebutted and unchallenged by any evidence. Still more important, that testimony as to the character of the building as reconstructed was not even questioned by a single word in the Tax Court's findings or opinion. The Tax Court just ignored it. What it did in effect was to determine the life of the building being depreciated by a building which was not even in existence during the period under review.

4. In reference to petitioners' contention of a conflict with *Spinks Realty Co. v. Commissioner,* 62 F. 2d 860 (C.A.D.C.), respondent says that "petitioners purchased and leased their building not on the condition that it be demolished, but with the understanding that it be improved." This is clearly contrary to the findings; the building was reconstructed but there is nothing to show that it was or had to be "improved," and certainly not in the sense which would be relevant here, lengthening the building's useful life. In this again respondent is trying to impute to the building as reconstructed the character of the building as originally designed and constructed.

II.

The Conflicts Are Clear and the Issues Involved Are of Great Importance.

Viewing the findings as they are, not as respondent has carefully misrepresented them, we again contend that the decision below is, as shown in our petition, in clear conflict with decisions of other circuits. We say in addition now that the issues presented are of the highest importance. Depreciation is an important factor in a large percentage of returns. We quote from 4 Mertens §23.01:

> "The scope of the subject may be readily appreciated when it is realized that in certain years total depreciation deductions have been larger than the total taxable net incomes of all corporations."

Certainly then the confusion which will necessarily result from each of the conflicts shown in the petition is a matter of great importance.

III.

Petitioners Seek Here Only a Remand to the Tax Court for Findings and Decision Based on the Building as Reconstructed.

Petitioners are not asking this court for a reversal of the Tax Court's decision. They seek only a remand to that court for findings based on the building as reconstructed, the building actually in existence during the year involved, and decision in conformity with such findings.

Conclusion.

In conclusion we submit again that the decision below should be reviewed by this Court.

Respectfully submitted,

GEORGE T. ALTMAN,
Attorney for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1965
No. 1028

LOUIS LESSER, *et al.*,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION. TO REMAND

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MOTION.

Reason for Motion.

Subsequent to the order of this Court herein denying certiorari, respondent issued a revenue ruling, just reported, Rev. Rul. 66-111, I.R.B. 1966-19, 6, the holding of which is based on the opinions herein of the courts below. That ruling indicates that, in respondent's own view now. as also clearly and precisely shown in the Motion below, he was in error in his Memorandum in Opposition herein in saying that the useful life of the building involved was determined by the Tax Court on the basis of the building as remodeled.

Petitioners, nevertheless, well realize the burden which reconsideration of the petition for certiorari on a petition for rehearing, however justified, would place upon this Court. For that reason they file this motion. which avoids any re-examination by this Court, sharply nar-

rows the issue, and places any onus for re-examination of the issue as narrowed upon the parties and the Tax Court. We most strongly urge this Court to allow this motion, in the interest of a question which the aforesaid ruling shows is of the highest importance.

Motion.

Petitioners now move the Court for (1) an order upon respondent to show cause why he would oppose a remand to the Tax Court solely for findings and decision based on the building involved as remodeled, and (2) unless respondent shows good cause, an order for such remand. As grounds for this motion petitioners show as follows:

Respondent, in his Memorandum in Opposition, contends, at page 4, that the Tax Court's opinion, "that the property was not a unique, single-purpose building," relates to the building as remodeled—this despite the fact that the Tax Court's only finding in that regard, 42 T.C. at page 696, relates expressly to the building "as originally designed and constructed." Respondent also says, at page 6, that the determination of the Tax Court as to useful life relates to the building both "before and after remodeling"—this despite the fact that the Tax Court's only determination of useful life, 42 T.C. at page 706, was expressly of the remaining useful life of the building "when acquired."

It is obvious, in any event, from both of said contentions of respondent that respondent agrees with petitioners that the depreciation should be based on the building as remodeled. It would appear inconceivable

then that respondent would oppose a remand to the Tax Court solely to make findings and decision based on the building as remodeled. If the Tax Court intended that its findings above pointed out relate also to the building as remodeled, it could easily now say so.

Wherefore, petitioners pray that this motion be granted.

Respectfully submitted,

GEORGE T. ALTMAN,

Attorney for Petitioners.

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Certificate of Counsel.

I am attorney of record for Petitioners and certify that in my judgment this Motion is well founded and that it is not interposed for delay.

GEORGE T. ALTMAN

Dated, Los Angeles, California,
May 19, 1966.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1028

LOUIS LESSER, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR ORDER TO SHOW CAUSE

Subsequent to this Court's denial of the petition for a writ of certiorari on May 2, 1966, petitioners submitted a motion for an order to show cause why this case should not be remanded to the Tax Court for a finding of the useful life of the Helipot Building as remodeled.

In support of this motion, petitioners reiterate the argument set forth in their petition for certiorari that the Tax Court erroneously based its determination of the useful life of the Helipot Building on the building as acquired and not as remodeled (Pet. 10). As pointed out in our memorandum in opposition to certiorari, however, while the Tax Court may have found that the building as acquired had a life of 45 years, it is also clear that the Tax Court rejected petitioners' argument that the remodeling in any way shortened

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the useful life of the building; the 45-year life accordingly was also applicable to the building as remodeled (Memo Op. 4).

Petitioners now claim that a recently issued ruling of the Internal Revenue Service, Rev. Rul. 66–111, I.R.B. 1966–19, p. 6 (a copy of which is attached hereto), conflicts with the government's position in the instant case. We disagree. The Ruling merely states that, when a taxpayer acquires a used building, he must depreciate it as a single asset, and that he may not elect to depreciate separately its component parts, such as ceilings, floors, etc. Accordingly, nothing in the Revenue Ruling is inconsistent with the lower courts' decisions in this case or with the position taken in our memorandum in opposition to certiorari.

In view of the foregoing, the denial of the petition for certiorari was correct, and there is no justification for the further action which petitioners request in their motion.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
GILBERT E. ANDREWS,
MARK S. ROTHMAN,
Attorneys.

JUNE 1966.

APPENDIX

Rev. Rul. 66–111:

> The basis of used real property such as a building ordinarily cannot be allocated into separate component accounts for the purpose of determining a composite life in computing depreciation allowances, but an overall useful life for the building must be determined on the basis of the building as a whole.

Advise has been requested whether the cost of used real property, mainly buildings, may be allocated to separate component units for the purpose of accounting for depreciable property under section 1.167(a)–7 of the Income Tax Regulations.

In the instant case, the taxpayer acquired an existing apartment building and land for a lump sum consideration. That part of the purchase price representing land value was allocated on the basis of recent sales of similar lands located in the general vicinity of the subject propery. The taxpayer allocated that part of the purchase price representing investment in the apartment building to various component units, some of which would normally have a shorter useful life than the building as a whole. The allocation of the taxpayer's basis in the building was made in proportion to the relative construction costs of the components as determined by the original owner.

In the case of the acquisition on or after March 1, 1913, of a combination of depreciable and nondepreciable property for a lump sum, as for example, buildings and land, the basis for depreciation cannot exceed an amount which bears the same proportion to the lump sum as the value of the depreciable property

at the time of acquisition bears to the value of the entire property at that time. Section 1.167(a)–5 of the regulations.

Depreciable property may be accounted for by treating each individual item as an account, or by combining two or more assets in a single account. Assets may be grouped in an account in a variety of ways. Section 1.167(a)–7 of the regulations.

In the case of new property where the taxpayer is the first user, the actual costs of the separate components are generally known and where such costs have been allocated to component groups by personnel competent in design, construction and auditing procedures, and complete and accurate property ledgers are maintained, properly allocated costs may be used by the original owner as a basis for depreciating the components separately, using an appropriate rate of depreciation for each of the separate components.

In the case of *Herbert Shainberg, et ux.* v. *Commissioner,* 33 T.C. 241 (1959), acquiescence, C.B. 1960–1, 5, the Tax Court of the United States permitted the taxpayer to allocate the actual costs of construction of new buildings in his shopping center into separate component group accounts, such as "structures," "wiring," "plumbing," "roof," "ceiling," and "flooring," for depreciation purposes.

When a used building is acquired for a lump-sum consideration, separate components are not bought; a unified structure is purchased. The individual components of a used building are not sold separately and hence are not ordinarily subject to fair market value determinations for allocation of basis or for depreciation purposes. The value of components (ceilings, floors, electrical systems, etc.) of a used building cannot be separated from the value of the building as a whole since their values exist only in connection with

the building as a whole. The original components in a new building bear a direct and known relationship to one another and to the total building cost; however, differing rates of depreciation for the components tend to distort this relationship with time. As a consequence, the new owners of a used building would not normally place the same relative values on components as the original known construction costs. Realistically, this difference in values is academic since the buyer and seller must only agree on an overall price for the unified structure.

In the case of *Louis Lesser and Jeanne Lesser, et al.*, v. *Commissioner*, 352 F. (2d) 789 (1965), the U.S. Court of Appeals for the Ninth Circuit, affirming the Tax Court, 42 T.C. 688 (1964), refused to accept as valid a composite rate for the useful life of a used building based on useful lives of its various components. The Court of Appeals stated: "The Tax Court found: 'The matter * * * is not susceptible of any precise mathematical solution.' We agree."

Accordingly, the basis of used real property, such as a building, ordinarily cannot be allocated into separate component accounts for the purpose of determining a composite life in computing depreciation allowances but an overall useful life for the building must be determined on the basis of the building as a whole.

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